

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SJ-2004-0198

NATHANIEL LAVALLEE, *et al.*

V.

THE JUSTICES OF THE SPRINGFIELD DISTRICT COURT

PETITIONERS' FURTHER STATUS REPORT AND
MOTION TO AMEND PETITION TO NAME ADDITIONAL
PETITIONERS AND RESPONDENTS

Now come the petitioners in the above-captioned case and report that the number of indigent defendants known to be entitled to counsel but without counsel in Hampden County has grown from 23 on May 6, 2004, to 37 on May 13, 2004, to 48 as of the date of this filing.

Petitioners hereby move to amend the petition to name additional petitioners, as further identified below.

Petitioners further state that indigent defendants entitled to counsel on cases before the Hampden Superior Court, and the Chicopee, Palmer, and Westfield District Courts are now without counsel, as further identified below. Accordingly, and for the reasons and grounds stated in Petitioners'

Memorandum in Support of Motion for Immediate Relief and Opposition to Respondents' Motion to Dismiss (filed on May 20, 2004, and incorporated herein by reference), and attached affidavit of Chief Counsel Leahy, petitioners hereby move to name as additional respondents:

- The Justices of the Hampden Superior Court
- The Justices of the Chicopee District Court
- The Justices of the Palmer District Court
- The Justices of the Westfield District Court

The following indigent defendants are, to the best of undersigned counsel's knowledge, without counsel as of the date of this filing. Petitioners move to amend the petition to name as additional petitioners those individuals identified in bold type face below.

Hampden Superior Court

1. **James Yates**; HR2004-00472. See attached affidavit of Chief Counsel Leahy.

Springfield District Court

2. **Jesus Gonzalez**; arraigned on April 13, 2004; #0423CR3333; Traf. in cocaine, firearm use in felony, poss. firearm w/out FID, carrying dang. weap., school zone, carrying firearm w/out lic.; held on bail of \$10,000 cash, \$100,000 surety.
3. **Albert J. Fulton, III**; arraigned on May 14, 2004; #0423CR3877; Firearms, armed home invasion,

armed asslt. in dwelling, armed rob.; held on bail of \$5,000 cash, \$50,000 surety.

4. **George Arroyo**; arraigned May 14, 2004, #0423CR4386; Dist. class A--subseq. off., poss. to dist. class A--subseq. off., school zone; held on bail of \$5,000 cash, \$50,000 surety.
5. **Eric Daniels**; arraigned on May 14, 2004, #0423CR4381; Poss. class B--subseq. off.; released.
6. **Rafael Mestre, Jr.**; arraigned on May 17, 2004, #0423CR4387; Dist. class B--subseq. off., school zone; held on bail of \$1,000 cash, \$10,000 surety.
7. **John Carter**; arraigned May 14, 2004, #0423CR4382; Poss. to dist. class B, school zone; posted \$250 cash bail.
8. **Abigail Velez**; arraigned May 14, 2004, #0423CR4393; Poss. to dist. class B, poss. unlawful fireworks; released on \$1000, personal surety.
9. **Arnold Freeman, aka Jeffrey Thompson**; arraigned May 5, 2004; shoplifting, larceny over, held on \$1000 cash bail.
10. **Reginald C. Smith**; arraigned May 5, 2004; poss. cl. B - subsequent offense; suspended lic. and other criminal traffic charges; released..
11. **Debra Staples**, arraigned May 5, 2004; common nightwalker; custody status unknown.
12. **Charles Foley**; arraigned May 5, 2004; poss. cl. D, rec'v stolen motor vehicle; released on \$100 cash bail.

13. Douglas Lewis; arraigned May 5, 2004; assault and battery, poss. cl. D; released on \$500 cash bail.
14. Keith E. Taskey; arraigned May 5, 2004; assault and battery with a dangerous weapon; held on \$5000 cash bail.
15. Dana J. Jones; arraigned May 5, 2004, violation of 209A, threats, use w/o authority; held w/o right to bail.
16. Jonathan Marrero; arraigned May 5, 2004; traff. in cocaine; released on \$2500 personal surety.
17. Joseph Polamtier; arraigned May 5, 2004; co-D with Marrero; traff. in cocaine; held on \$500 cash bail.
18. Harold Vargas; arrignment date unknown; trafficking in cocaine; posted \$2500 cash bail.^{1/}
19. **Luciano Claudio, Jr.**; arraigned April 20, 2004, #0423CR3548, Poss. class D, subseq. off.; Dist. class B subseq. off., poss. class D, school zone; held on \$10,000 cash bail.
20. **Willie Middlebrooks**; arraigned April 9, 2004, #0423CR3236; Dist. class A--subseq. off., poss. to dist. A--subseq. off., poss. class B--subseq. off.; held on bail of \$5,000 cash, \$50,000 surety.
21. **Isaac Verdejo**; arraigned May 5, 2004; #0323CR12227, #0423CR3952, viol. 209A, mal. damage to motor vehicle, assault and battery; released on \$1500 cash bail.

^{1/}In the Status Report filed on May 13, 2004, petitioners reported that counsel had been found for Mr. Vargas. That information now appears to have been in error.

22. **Roberto Echevarria**; arraigned May 6, 2004; #0423CR2552; assault and battery, threats, intimidation of witness; released on personal recognizance.
23. **Tina Welch**; arraigned May 6, 2004; trafficking in cocaine; held on \$250 bail.
24. **Cory Phillips**; arraigned on May 6, 2004; #0423CR4070; Dist. class B, school zone; posted \$100 cash bail.
25. **Julio Morales**; arraigned May 6, 2004; poss. to dist cl. B. poss. to dist cl. A, school zone; held on \$750 cash bail.
26. **Leo Freeman**; arraigned May 6, 2004; #0423CR4073; Asslt, resist arrest, dis. conduct; released on personal recognizance.
27. **Serafin Melendez**; arraigned on May 6, 2004, #0423CR4077; Poss. class B--subseq. off.; posted \$100 cash bail.
28. **Vernon Holmes**; arraigned April 2, 2004, #0423CR4253; dist. cl B subsequent offense, school zone; held on \$5000 cash bail.
29. **Miguel Rivera**, arraignment date unknown; #0423CR3365; dist. cl. A, sub. offense, school zone; #0323CR7508; VOP; held on \$5000 cash bail.

Holyoke District Court

30. **Joel J. Rodriguez**; arraigned February 19, 2004; held on bail of \$5,000 cash or \$30,000 surety; indicted week of May 4, 2004.

31. Michael Carabello; arraigned April 2, 2004; held on bail of \$100,000 cash or \$500,000 surety.
32. Alberto Rivera; arraigned April 23, 2004; held on bail of \$10,000 cash or \$100,000 surety.
33. **Gregorio Garcia**; charge amended April 28, 2004; held on bail of \$25,000 cash or \$250,000 surety.
34. Luis Vallellanes; arraigned on February 19, 2004; held on bail of \$10,000 cash or \$35,000 surety.
35. **Jorge L. Garcia**; arraigned April 7, 2004; released on bail of \$10,000, personal surety.

Chicopee District Court

36. **Abraham Muniz**; arraigned April 20, 2004; held on \$5,000 cash bail.
37. **Thiago Barros**; arraigned April 20, 2004; held on \$50,000 cash bail.
38. **Tawanda Knighton**; arraigned May 11, 2004; held on \$1,000 cash bail.
39. **Philip Langley**, arraigned May 10, 2004; #0420CR0828; agg. rape, A & B, Distr. Cocaine, carrying a firearm, using a firearm in the commission of a felony, Poss. cl. D. Held on \$250,000 cash bail.
40. **Patrick Bass**, arraigned May 17, 2004; #0420CR08601; agg. rape; \$500 cash bail posted.

Palmer District Court

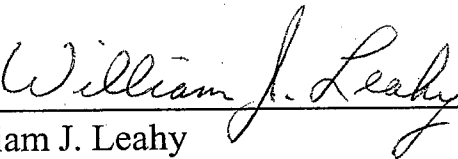
41. **Tami Przybycies**; arraigned April 6, 2004; released on personal recognizance, with conditions.
42. **Nelson Dinzey**; arraigned April 16, 2004; under sentence.
43. **Alexander Perez**; arraigned April 16, 2004; released on bail.

Westfield District Court

44. **Lisa Quinn**; arraigned May 13, 2004; #0444CR0741, 0444CR0823; Dist. class D, threat to commit murder, armed asslt to murder, A&B dang. weap, A&B; held without right to bail.
45. **Christopher Medina**; arraigned May 17, 2004; #0444CR0848; Traf. cocaine, poss. class D; held on bail of \$5,000 cash or surety
46. **Marco Sostre**; arraigned May 17, 2004; #0444CR0851; Traf. cocaine, false name; held on bail of \$50,0000.
47. **Alban Medina**; arraigned May 17, 2004; #0444CR0852; Traf. cocaine, carry dang. weap., poss. firearm w/out F.I.D. card, use of firearm in felony, use of firearm w/ prior viol./drug conviction; held on bail of \$100,000 cash.
48. **Racqual Garcia**; arraigned May 17, 2004; #0444CR0853; Traf. cocaine, poss. class B; held on \$2,000 cash bail.

Petitioners further report that, as to the following individuals named in the petition, counsel has either been found or the case requiring counsel has otherwise been resolved: Nathaniel Lavallee; Jamar T. Gillerson; Cordelle Simmonds; Corey L. Smith; Maria Alvarado; Luis A. Osorio; Omar Hall; and Angel Rivera.

COMMITTEE FOR PUBLIC COUNSEL SERVICES
By its Chief Counsel,



William J. Leahy

BBO #290140

COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street, Suite 200
Boston, Massachusetts 02108
(617) 482-6212

Dated: May 21, 2004.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2004-1998

NATHANIEL LAVALLEE, *et al.*

V.

THE JUSTICES OF THE SPRINGFIELD DISTRICT COURT

AFFIDAVIT IN SUPPORT OF PETITIONERS FURTHER STATUS
REPORT AND MOTION TO AMEND PETITION TO NAME
ADDITIONAL PETITIONERS AND RESPONDENTS

Now comes William J. Leahy, Chief Counsel of the Committee for Public Counsel Services, and states that:

1. Late in the afternoon on Friday, May 14, 2004, I received via fax from the Hampden County Superior Court clerk's office a MEMORANDUM OF PROCEEDINGS AND ORDER TO ASSIGN COUNSEL in the case of Commonwealth v. James Yates, Hampden County indictment number 04-472, charging the offenses of unlawful possession of a Class B substance (cocaine) with intent to distribute, G.L. c.94C, §32A(c), and violation of the controlled substance law in a school zone, G.L. c.94C, §32J. A copy of the Court's Memorandum and Order is attached hereto as Attachment 1.

2. The Memorandum related that a public defender with the Springfield trial office of CPCS had been assigned to represent a co-defendant of Mr. Yates; and it further stated that nine private attorneys certified by CPCS to accept Superior Court case assignments were present in the courtroom but would not accept assignment in this case.

3. Subsequently, on May 20, 2004, when I had a chance to examine the docket entries in Mr. Yates' case, I learned that two additional co-defendants had been arraigned and had been assigned private attorneys on May 14, 2004. Those defendants are Jose Carlos Perez (HDCR2004-00474, represented by Attorney Johnathan Elliott) and Jose Carlos Rivera-Vega (HDCR2004-00475, represented by Attorney Thomas McGuire). Trial dates as to each case were set for November 10, 2004. The final co-defendant, Julio Llanos, is represented in HDCR2004-00473 by Attorney Joan Williams, a staff attorney in the Public Defender Division's Springfield office.

4. In its Yates memorandum, the Court (Sweeney, J.) ordered that "the Committee for Public Counsel shall forthwith assign counsel to represent the defendant and that such counsel appear before the Court on May 20, 2004." The memorandum and order, which bore a date of May 14, 2004, was ordered to be sent to "each committee member and their chief

counsel” at the CPCS office located at 44 Bromfield Street in Boston.

(None of the members of CPCS' board have offices at this address.) Copies were also ordered to be sent to Mr. Yates and to the District Attorney for Hampden County.

5. The Court incorporated by reference its previous order in Commonwealth v. Wheeler, HDCR2002-00150, which had been issued on February 19, 2004. A copy of the order in the Wheeler case is attached to this affidavit as Attachment 2.

6. Notice of CPCS's compliance with the order in Wheeler was provided to the Court in my letter dated February 25, 2004, a copy of which is attached hereto as Attachment 3.

7. Since February 19, 2004, the Hampden County Superior Court (Sweeney, J.) has issued nine orders, each essentially identical to that issued in the Wheeler case. While CPCS had, after great effort, been successful in complying with eight of the orders (two remain outstanding), we were, despite equally vigorous efforts, unsuccessful in our effort to procure counsel for Mr. Yates at the prevailing hourly rate.

8. In an effort to comply with the order in Yates, I persuaded a CPCS Superior Court certified attorney, Attorney Bonnie Allen, to represent Mr. Yates, if the Court would act favorably on a Motion to Assign Certified

Private Counsel, at a rate of \$90 per hour, which motion I prepared for filing and attach hereto with its affidavit and attachments, all as Attachment 4.

9. On May 20, 2004, I responded on behalf of CPCS to the Superior Court's order by appearing personally in Hampden Superior Court, first criminal session, at the call of Mr. Yates' case for arraignment. With me at counsel table was Attorney Allen. Mr. Yates, who had been released on bail in the District Court, was also present.

10. The hearing was brief and contentious. The Court (Sweeney, J.) asked if I was appearing to represent Mr. Yates. I replied that I was not appearing to represent Mr. Yates, but was appearing on behalf of CPCS in response to the Court's May 14 order, and was prepared to file an appearance on behalf of CPCS for that purpose. The court declined my offer to file an appearance on behalf of CPCS. The Court then asked Attorney Allen whether she was entering an appearance to represent Mr. Yates. When Attorney Allen responded that she would represent Mr. Yates if the CPCS motion were allowed, the Court stated that it would take no action on the motion, and expressed its intention to issue an order which would require each individual board member of the Committee for Public Counsel Services to appear personally at some future date, for the purpose of showing cause why each should not be held in contempt of court.

11. I stated my objection to the Court's refusal to rule upon the Motion to Assign Certified Private Counsel. I requested an opportunity to be heard in response to the court's expressed intention to require Committee members to appear. I noted my objection to the Court's refusal to hear me on this point.

12. The Court did not assign counsel to represent Mr. Yates.

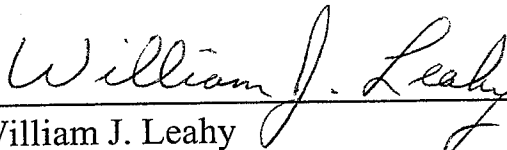
13. The information set forth in "Petitioners' Further Status Report and Motion to Amend Petition to Name Additional Petitioners and Respondents," regarding each of the identified indigent criminal defendants without counsel, is based upon information compiled from reports received from the clerk's office of each of the courts described therein, information and reports provided by employees of the Hampden County Bar Advocate Program, information and reports provided by staff attorneys and support staff of the CPCS Springfield and Boston offices, and in the case of Robert Yates, also upon this affiant's firsthand observations.

14. Earlier today, I received from the Chicopee Division of the District Court Department a copy of a report of a question of law made by a justice of that Court (Koenigs, J.) to the Appeals Court. The report relates to the pending criminal proceedings in the Chicopee District Court against Phillip Langley and Patrick Bass, two of the 49 indigent defendants

identified in today's Further Status Report. A copy of Judge Koenig's
"Report of Issue Pursuant to Mass. R. Crim. P. 34 And G.L. c. 218, §26A"
is attached hereto as Attachment 5.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

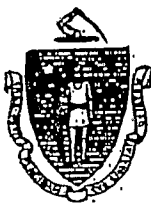
THIS 21st DAY OF MAY, 2004.



William J. Leahy
Chief Counsel
COMMITTEE FOR PUBLIC COUNSEL SERVICES
BBO #290140
44 Bromfield Street, Suite 200
Boston, Massachusetts 02108
(617) 482-6212

ATTACHMENT 1

MARIE G. MAZZA, ESQUIRE
CLERK OF COURTS



Hampden Superior Court
Commonwealth of Massachusetts
Office of the Clerk of Courts

FIRST ASSISTANT CLERK
DAVID M. CHERNOCK

ASSISTANT MAGISTRATE
STEPHANIE A. ROSCOE, ESQ.

ASSISTANT CLERKS
KEVIN J. CLAFFEY, ESQ.
CHERYL A. COSSABOOM
MARY C. CULLINAN
WILLIAM L. EASON
JOHN J. FITZGERALD
LAURA S. GENTILE, ESQ.
TERRENCE C. GINLEY
DAPHNE G. MOORE, ESQ.

ADDRESS ALL COMMUNICATIONS TO:
CLERK, SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
HALL OF JUSTICE
P.O. BOX 559, 50 STATE STREET
SPRINGFIELD, MASSACHUSETTS 01102-0559

- FAX TRANSMITTAL COVER LETTER -

Office (413)735-6016 or 6017

Fax (413)737-1611 TTY (413)827-9379

Date: 5-14-04

Time: 4:11 pm

Please Deliver Telefax to the Following: Willie J. Davis (Chairman)

Eileen D. Agnes, Victoria M. Bonilla, Ann V. Crowley, Derege B.
Demissie, Judith A. Egan, Matthew H. Feinberg, Judith L. Lindahl,
Peter J. Muse, John T. Oudekirk Jr., Robert H. Quinn, Charles W.
Rankin, Robin L. Stolk, Dorothy Meyer Storrow, and W. Paul White.
Docket # Chief Legal Counsel is William J. Leahy

From: Superior Court Clerk's Office - Shannon PiccuchTotal number of pages transmitted (Including Cover Page) 3

If you do not receive all of the pages as indicated, please call EXT.

Immediately. Thank You.

Additional Message:

Please make copies of order and
distribute to each of the above named.
Thank you,
Shannon Piccuch
Court Coordinator

PLEASE NOTE:

If this message has been received in error by a party to whom it is NOT
addressed, please call EXT. 7236 and destroy the transmittal material.
THANK YOU.

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss

Superior Court
Criminal Case No. 04-472HAMPDEN COUNTY
SUPERIOR COURT
FILED

COMMONWEALTH

MAY 14 2004

vs.

James Yates


CLERK-MAGISTRATE**MEMORANDUM OF PROCEEDINGS AND ORDER TO ASSIGN COUNSEL**

For the reasons stated herein, the Committee for Public Counsel Services (C.P.C.S.) shall forthwith assign counsel to represent the defendant James Yates in the above-captioned criminal case.

On May 14, 2004 the defendant came before the court for Arraignment on Indictment No. 04-472, charging him with:

Count 1 - Unlawful possession of a controlled substance with intent to distribute (Class B - Cocaine) 94C-32A(c)

Count 2 - Violation of controlled substance law school or park zone 94C-32J

The court attempted to assign counsel to represent the defendant (Supreme Judicial Court Rule 3:10, § 5 and Superior Court Rule 53).

An attorney in the Springfield Trial Office of C.P.C.S. represents a co-defendant. When the arraignment was called in the First Session this morning there were nine private attorneys approved by C.P.C.S. for private sector appointment present in the courtroom. None of them would accept an appointment as counsel for the defendant. As a result of the private sector attorneys' refusal to accept appointment, the defendant is unrepresented. I continued his Arraignment until May 20, 2004.

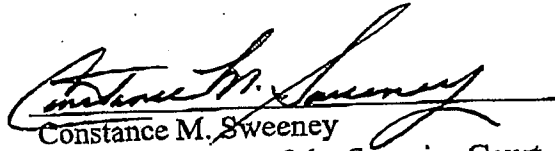
All of the legal criteria for appointment of counsel are met in this case. The defendant is indigent. He is charged with crimes punishable by imprisonment. He has not retained counsel nor has he elected to proceed pro se. The laws of the Commonwealth require C.P.C.S. to assign counsel

1
According to the C.P.C.S. website, the current committee members are Willie J. Davis (Chairman), Eileen D. Agnes, Victoria M. Bonilla, Ann V. Crowley, Derege B. Demissie, Judith A. Egan, Matthew H. Feinberg, Judith L. Lindahl, Peter J. Muse, John T. Ouderkirk, Jr., Robert H. Quinn, Charles W. Rankin, Robin L. Stolk, Dorothy Meyer Storrow, and W. Paul White. Chief legal counsel is William J. Leahy.

under these circumstances.² They must do so.

Therefore, it is **ORDERED** that the Committee for Public Counsel shall forthwith assign counsel to represent the defendant and that such counsel appear before the court on, May 20, 2004. The clerk's office shall give notice of this order by electronic facsimile and first class mail addressed to the each committee member and their chief counsel (see fn. 1) at the Committee for Public Counsel Services, 44 Bromfield Street, Boston, MA., 02108. A copy of this order shall be sent to the defendant at his last and usual place of address/ or at the following facility if applicable Hampden County House of Correction. The clerk shall provide the District Attorney with a copy of this order.

Dated: May 14, 2004


Constance M. Sweeney
Associate Justice of the Superior Court

FEB 23 2

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

SUPERIOR COURT
INDICTMENT NOS.
04-0150-1 thru 3

COMMONWEALTH

vs.

KELLY WHEELER

HAMPDEN COUNTY
SUPERIOR COURT
FILED

FEB 19 2004

Marie Maggo
CLERK-MAGISTRATE

MEMORANDUM OF PROCEEDINGS AND ORDER TO ASSIGN COUNSEL

For the reasons stated herein, the Committee for Public Counsel Services (C.P.C.S.) shall forthwith assign counsel to represent the defendant Kelly Wheeler in the above-captioned criminal case.¹

On February 18, 2004, the defendant came before the court for arraignment on Indictment No. 04-0150. The indictment charges the defendant with two counts of Unarmed Burglary (G. L. c. 266, § 15) and one count of Larceny from a Building (G. L. 266, § 20). The defendant is indigent (Supreme Judicial Court Rule 3:10, §§ 1- 4). The court attempted to assign counsel to represent the defendant (Supreme Judicial Court Rule 3:10, § 5 and Superior Court Rule 53).

Andrew Klyman, Attorney In Charge - Springfield Trial Office of C.P.C.S., declined to file an appearance for the defendant and also notified the court that no one in his office would file an appearance, purportedly because of burdensome workloads. At least a dozen private attorneys approved by C.P.C.S. for private sector appointment were present in the courtroom. None of them would accept an appointment as counsel for the defendant. As a result of the public and private sector attorneys' refusal to accept appointment, the defendant is unrepresented. I continued her arraignment until February 25, 2004. I ordered that not guilty pleas enter on her behalf until she has counsel. Her bail was temporarily set in the amount of \$1,000 cash or surety

¹ According to the C.P.C.S. website, the current committee members are Willie J. Davis (Chairman), Eileen D. Agnes, Victoria M. Bonilla, Ann V. Crowley, Derege B. Demissie, Judith A. Egan, Matthew H. Feinberg, Judith L. Lindahl, Peter J. Muse, John T. Ouderkirk, Jr., Robert H. Quinn, Charles W. Rankin, Robin L. Stolk, Dorothy Meyer Storrow, and W. Paul White. Chief legal counsel is William J. Leahy.

without prejudice.² This is the same bail amount set in the District Court where the charges were originally filed. The defendant has not or cannot post the bail and remains imprisoned awaiting assignment of counsel and formal arraignment.

The refusal of attorneys to accept appointment in this case is not an aberration. For at least the last several weeks, almost the same scenario has occurred in other cases. The court is aware that there is great frustration amongst private sector attorneys over the paucity of the statutory hourly rate and the government's delay in payment. It is reasonably clear that this frustration is at least a partial cause of some attorneys' refusal to accept appointments. The court cannot be used as a pawn in this dispute, particularly where a defendant's fundamental right to counsel and her liberty interests are at stake. In *Commonwealth v. Rainwater*, 425 Mass. 540, 554 (Mass. 1997), the Supreme Judicial Court stated:

"... this court and the bar of the Commonwealth have historically taken measures to assure persons charged with crime the benefits of legal representation. Thus the Supreme Judicial Court adopted a rule which required the appointment of counsel in all noncapital felony cases in 1958, five years before *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), imposed this obligation on the States. See Rule 10 of the General Rules, 337 Mass. 813 (1958) (now S.J.C. Rule 3:10, as appearing in 416 Mass. 1306 [1993]). In 1964, this right was expanded to encompass indigent defendants who were charged with any crime which might result in imprisonment, Rule 10 of the General Rules, as appearing in 347 Mass. 809 (1964), several years before the Supreme Court declared the same right under the Federal Constitution. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012-2013, 32 L.Ed.2d 530 (1972)."

All of the legal criteria for appointment of counsel are met in this case. The defendant is indigent. She is charged with crimes punishable by imprisonment. She has not retained counsel nor has she elected to proceed pro se. The laws of the Commonwealth require C.P.C.S. to assign counsel under these circumstances.³ They must do so.

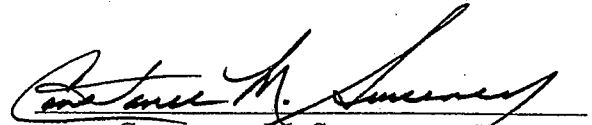
Therefore, it is **ORDERED** that the Committee for Public Counsel shall forthwith assign

² When the defendant came before the Superior Court to answer to the indictment, the underlying District Court case ended. If I had not set bail, the defendant would have been held on the grand jury warrant. In situations where that occurs, the sheriff take defendants into custody on what is effectively a "held without right to bail status." This in turn leads to a defendant being held in what is essentially solitary confinement until a bail is set.

³G. L., c. 211D, § 5 provides: "Said committee shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel; and provided further, that such person is unable to obtain counsel by reason of his indigency. . . . A justice or associate justice shall assign a case to the committee, as hereafter provided, after receiving from the probation officer a written report containing the probation officer's opinion as to the defendant's ability to pay for counsel, based on the standards and procedures provided for in section two."

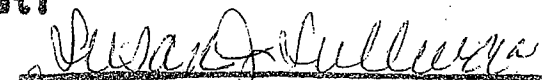
counsel to represent the defendant. The clerk's office shall give notice of this order by electronic facsimile and first class mail addressed to the each committee member and their chief counsel (see fn. 1) at the Committee for Public Counsel Services, 44 Bromfield Street, Boston, MA., 02108. A copy of this order shall be sent to the defendant at the Hampden County Jail and House of Correction in Ludlow. The clerk shall provide the District Attorney with a copy of this order.

Dated: February 19, 2004


Constance M. Sweeney
Associate Justice of the Superior Court

A true copy.

Attest:


Deputy Assistant Clerk

*The Commonwealth of Massachusetts
Committee for Public Counsel Services*

44 Bromfield Street

Boston, MA 02108

Telephone (617) 482-6212

Fax (617) 988-8407



William J. Leahy
Chief Counsel
Patricia A. Wynn
Deputy Chief Counsel
Private Counsel Division
Andrew Silverman
Deputy Chief Counsel
Public Defender Division

February 25, 2004

Honorable Constance M. Sweeney
Associate Justice
Hampden Superior Court
P.O. Box 559
Springfield MA 01102-0559

Re: Commonwealth v. Kelly Wheeler
Commonwealth v. Jason Paniagua
Commonwealth v. Luis Cabrera

Dear Judge Sweeney,

I am pleased to report that we have been able to assign counsel for the above-named defendants, in compliance with your orders of February 19, 2004. Through the combined efforts of Attorney Klyman and Attorney Bonavita and their offices, we have also been able to assign counsel for several additional defendants who have been without counsel.

Furthermore, on Monday, February 23 I filed an emergency request for supplemental funding for three additional public defenders in our Springfield office, upon which I urged speedy consideration at yesterday's joint Ways and Means budget hearing in Worcester. In my testimony I highlighted the Hampden County counsel crisis, and urged approval of the CPCS proposal for significant increases in private assigned counsel and CPCS staff counsel compensation.

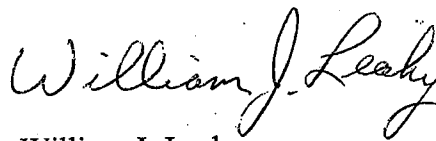
Notwithstanding these positive steps, the counsel crisis is a long way from being resolved. The public defender office is fast approaching its maximum caseload limit, which I have personally established after consultation with Attorney Klyman and statewide public defender head Andrew Silverman, with full consideration of the shortage of private counsel. That capacity is essential to our staff attorneys' compliance with fundamental professional and

ethical obligations and their responsibility to provide effective representation to every one of their clients; and I will not shirk my duty to enforce it. The capacity of the private bar is uncertain, although we are doing everything we can to persuade attorneys to accept assignments to represent defendants who are now without counsel. I fear, however, that private counsel availability may continue to be limited until such time as the compensation levels have been raised.

In order to ensure that everything which can be done is being done to provide counsel for indigent defendants, Patricia Wynn and Andrew Silverman and I will meet tomorrow at 11:30 a.m. in Springfield with Attorneys Klyman and Bonavita and their staffs. We want to assure ourselves that we are leaving no stone unturned in our effort to provide a Superior Court certified attorney to every defendant who is entitled to the assistance of counsel.

We would very much appreciate an opportunity to hear your views and suggestions for alleviating this crisis as well. If it is convenient, we would be happy to meet with you, perhaps during the lunch recess tomorrow, for this purpose. In any case, I will provide you and Judge Velis with a status report after our meeting with our Springfield private and public counsel leaders.

Very Truly Yours,

A handwritten signature in cursive script that reads "William J. Leahy". The signature is written in dark ink and is positioned above the typed name and title.

William J. Leahy
Chief Counsel

cc: Honorable Peter A. Velis, Associate Justice, Hampden Superior Court
Chief Justice for Administration and Management Robert A. Mulligan
Superior Court Chief Justice Suzanne V. DeVecchio
Hampden County Bar Advocates, Inc. President Anthony C. Bonavita
Hampden County CPCS Attorney-in-Charge Andrew M. Klyman
CPCS Deputy Chief Counsel, Private Counsel Division, Patricia Wynn
CPCS Deputy Chief Counsel, Public Defender Division, Andrew Silverman

ATTACHMENT 4

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN,ss.

SUPERIOR COURT DEPARTMENT
No. 04-472

COMMONWEALTH

V.

JAMES YATES

MOTION TO ASSIGN CERTIFIED PRIVATE COUNSEL

Now comes the Committee for Public Counsel Services (CPCS) on behalf of this defendant and requests this Honorable Court to enforce his right to counsel by assigning a CPCS-certified private attorney to represent him in this matter.

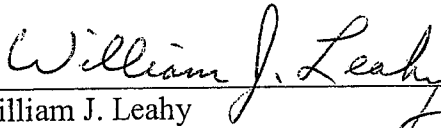
This defendant's right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 12 of the Declaration of Rights in the Massachusetts Constitution. It is effective at "the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information or arraignment." Commonwealth v. Smallwood, 379 Mass. 878, 884 (1980), quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972). For the reasons stated in the attached affidavit of the CPCS chief counsel, CPCS is unable to provide counsel for this defendant under currently authorized rates of compensation.

This Court has the authority and the responsibility under its inherent authority to enforce the law and the constitution, see e.g., O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507 (1972); under the "exceptional circumstances" provision of Supreme Judicial Court Rule 3:10, Section 5, and under Supreme Judicial Court Rule 1:05(4), to take such action as is necessary to provide competent counsel to assist this defendant.

Should this Court deny this motion, CPCS respectfully requests that the defendant be released on his personal recognizance forthwith, and that these criminal proceedings be stayed until counsel has been appointed, or in the alternative until his request for counsel has been heard and determined by our appellate courts.

CPCS further requests a hearing upon this motion.

THE COMMITTEE FOR PUBLIC COUNSEL SERVICES
By its Chief Counsel:



William J. Leahy
BBO No. 290140
44 Bromfield Street
Boston, MA 02108
(617) 422-6212

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN,ss.

SUPERIOR COURT DEPARTMENT
NO. 04-472

COMMONWEALTH

V.

JAMES YATES

AFFIDAVIT OF WILLIAM J. LEAHY

I, William J. Leahy, hereby state that:

1. On May 14, 2004, I received via facsimile a MEMORANDUM OF PROCEEDINGS AND ORDER TO ASSIGN COUNSEL from Hampden County Superior Court (Sweeney, J.) in the case of Commonwealth v. James Yates, Criminal Case No. 04-472. A copy of the memorandum is attached hereto as Appendix A.

2. Mr. Yates appears to be charged with two drug offenses which are within the final jurisdiction of the District Court. Nevertheless, he was indicted.

3. The memorandum relates that at the time of Mr. Yates' scheduled arraignment, nine CPCS-certified private attorneys were present in the courtroom, and that "[n]one of them would accept an appointment as counsel for the defendant."

4. The Court ordered CPCS to "forthwith assign counsel to represent the defendant and that such counsel appear before the court on May 20, 2004."

5. This was at least the tenth nearly identical order which I had received, in my capacity as CPCS chief counsel, from this court since February 19, 2004.

6. As I have informed the Court in my letter of February 25, 2004, and my **Declaration of Counsel Emergency in Hampden County** on April 20, 2004, the root of the unavailability of private counsel in Hampden County Superior Court is the stagnant and inadequate hourly rate of compensation which CPCS is authorized to pay, under its statutory budget provisions, for their professional services.

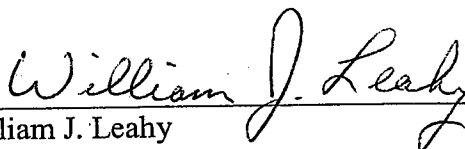
7. Despite every effort which has been made by CPCS and the Hampden County Bar Advocate Program, as set forth in this affidavit and its attachments and, in much greater detail, in the affidavits on file in the case of LAVALLEE et al. v. THE JUSTICES OF THE

SPRINGFIELD DISTRICT COURT, Supreme Judicial Court for Suffolk County, No. SJ 2004-198, we have not been able to find counsel for Mr. Yates at the existing rates of compensation.

8. To carry out the assignment to private counsel of criminal cases at the trial level, CPCS contracts with assignment programs, often called Bar Advocate Programs, in twelve counties. The contracts between CPCS and the Bar Advocate Programs do not include any requirement that a participating attorney accept any particular number of case assignments, as such a requirement would discourage participation by many qualified attorneys, to the detriment of indigent defendants. Thus CPCS has no statutory or contractual authority to compel an unwilling private attorney to accept an assignment in any particular case.

9. Attorney Bonnie Allen of Springfield has agreed to represent Mr. Yates, if this Court should order that she be compensated at the CPCS approved rate of \$90 per hour. Attorney Allen's affidavit is attached hereto as Appendix B.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY ON THIS 19th DAY
OF MAY, 2004.



William J. Leahy
BBO No. 290140
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 482-6212

Appendix A

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss

Superior Court
Criminal Case No. 04-472

HAMPDEN COUNTY
SUPERIOR COURT
FILED

MAY 14 2004

COMMONWEALTH

vs.

James Yates


CLERK-MAGISTRATE

MEMORANDUM OF PROCEEDINGS AND ORDER TO ASSIGN COUNSEL

For the reasons stated herein, the Committee for Public Counsel Services (C.P.C.S.) shall forthwith assign counsel to represent the defendant James Yates in the above-captioned criminal case.¹

On May 14, 2004 the defendant came before the court for Arraignment on Indictment No. 04-472, charging him with:

Count 1 - Unlawful possession of a controlled substance with intent to distribute (Class B - Cocaine) 94C-32A(c)

Count 2 - Violation of controlled substance law school or park zone 94C-32J

The court attempted to assign counsel to represent the defendant (Supreme Judicial Court Rule 3:10, § 5 and Superior Court Rule 53).

An attorney in the Springfield Trial Office of C.P.C.S. represents a co-defendant. When the arraignment was called in the First Session this morning there were nine private attorneys approved by C.P.C.S. for private sector appointment present in the courtroom. None of them would accept an appointment as counsel for the defendant. As a result of the private sector attorneys' refusal to accept appointment, the defendant is unrepresented. I continued his Arraignment until May 20, 2004.

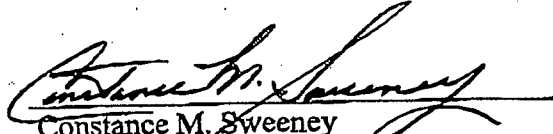
All of the legal criteria for appointment of counsel are met in this case. The defendant is indigent. He is charged with crimes punishable by imprisonment. He has not retained counsel nor has he elected to proceed pro se. The laws of the Commonwealth require C.P.C.S. to assign counsel

¹
According to the C.P.C.S. website, the current committee members are Willie J. Davis (Chairman), Eileen D. Agnes, Victoria M. Bonilla, Ann V. Crowley, Derege B. Demissie, Judith A. Egan, Matthew H. Feinberg, Judith L. Lindahl, Peter J. Muse, John T. Ouderkirk, Jr., Robert H. Quinn, Charles W. Rankin, Robin L. Stolk, Dorothy Meyer Storrow, and W. Paul White. Chief legal counsel is William J. Leahy.

under these circumstances.² They must do so.

Therefore, it is **ORDERED** that the Committee for Public Counsel shall forthwith assign counsel to represent the defendant and that such counsel appear before the court on, May 20, 2004. The clerk's office shall give notice of this order by electronic facsimile and first class mail addressed to the each committee member and their chief counsel (see fn. 1) at the Committee for Public Counsel Services, 44 Bromfield Street, Boston, MA., 02108. A copy of this order shall be sent to the defendant at his last and usual place of address/ or at the following facility if applicable Hampden County House of Correction. The clerk shall provide the District Attorney with a copy of this order.

Dated: May 14, 2004


Constance M. Sweeney
Associate Justice of the Superior Court

Appendix B

AFFIDAVIT OF BONNIE G. ALLEN

I, Bonnie G. Allen, an attorney practicing at 1145 Main Street, Suite 212, Springfield, Massachusetts, under oath do depose and say that:

1. I was admitted to the Massachusetts Bar in 1993 and am presently in good standing.
2. I have participated in the Hampden County Bar Advocates program since November, 1998. I have been certified to accept appointments in Superior Court cases since that time.
3. On all of the cases in which I have accepted appointments, I have been compensated at the rate of \$30.00 per hour in District Court and \$39.00 per hour in Superior Court.
4. I have recently made the decision to no longer accept assignment of Superior Court matters on a regular basis. Superior Court cases are serious and complex, requiring substantial time and attention, and highly skilled defense counsel who can shoulder the responsibility of providing representation to clients who face substantial state prison sentences. The current rate of compensation is not commensurate with the high degree of skill and dedication necessary to properly defend someone on such serious matters.
5. The current rates of compensation are inadequate for me to maintain my office, health insurance and pay for office equipment and other necessities, and still earn a living.
6. It is my understanding that the Committee for Public Counsel Services has voted to establish a rate of compensation of \$90.00 per hour for Superior Court cases

and \$60.00 per hour for District Court cases. While these rates are still less than I charge private clients, I would be willing to accept appointments at these levels of compensation.

7. I have been contacted by the Committee for Public Counsel and asked if I would accept an appointment to represent Mr. James Yates who is charged with possession with intent to distribute cocaine under M.G.L. c. 94C § 32A(c) and violation of a school or park zone, in the Hampden County Superior Court, if I were compensated at the rate \$90.00 per hour. I have indicated that I would be willing to accept this appointment at this rate.

Signed under the pains and penalties of perjury this _____ day of May, 2004 at
Springfield.

Bonnie G. Allen
1145 Main Street, Suite 212
Springfield, MA 01103
(413) 734-0100
BBO# 563995



MAY 21 2004

**Trial Court of the Commonwealth
District Court Department**

Paul M. Kozikowski
Clerk-Magistrate
(413) 598-0099 Ext. 207
FAX (413) 594-6187

CHICOPEE DIVISION
30 Church Street
Chicopee, Massachusetts 01020

Michael J. Placzek
Chief Probation Officer
(413) 594-5921 Ext. 238
FAX (413) 598-8176

MARY E. HURLEY-MARKS, First Justice
David S. Ross, Associate Justice
John M. Payne, Associate Justice
Judges Lobby
(413) 598-0099 Ext. 209 • FAX (413) 598-8268
TTY (413) 594-8624

May 20, 2004

District Attorney William M. Bennet
Hall of Justice
50 State Street
Springfield, MA 01103

Mr. William Leahy
Committee for Public Counsel Services
44 Brownfield Street, 2nd Floor
Boston, MA 02108

Dear Sirs:

Please be advised that the enclosed report to the Appeals Court has been filed today.

Very truly yours,

A handwritten signature in cursive script, reading "Rita S. Koenigs".

Rita S. Koenigs
Associate Justice of the District Court

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

TRIAL COURT OF COMMONWEALTH
DISTRICT COURT DEPARTMENT
CHICOPEE DIVISION
NOS. 04 20 CR 828
04 20 CR 860

COMMONWEALTH OF MASSACHUSETTS

vs.

PHILIP LANGLEY

COMMONWEALTH OF MASSACHUSETTS

vs.

PARTICK BASS

REPORT OF ISSUE PURSUANT TO MASS.R.CRIM.P. 34
And G.L. c. 218, §26A

To the Honorable Justices of the Massachusetts Appeals Court:

Because of the frequency in which this issue has arisen, I respectfully report the following issues to the Appeals Court pursuant to Mass. Rules of Crim. Proc. 34:

1. *Bail hearings.* Where the trial court has appointed the Committee for Public Counsel Services pursuant to G. L. c. 211 D, § 5, to represent an indigent defendant in a criminal case, and the committee fails to provide representation for said defendant, is it error for the court conduct a bail hearing at which the indigent defendant is unrepresented by counsel?
2. *Dangerousness hearings.* Where the trial court has appointed the Committee for Public Counsel Services to represent an indigent defendant in a criminal

case, and the committee fails to provide representation for said defendant, is it error for the court conduct a dangerousness hearing pursuant to G.L. c. 276, § 58A, at which the defendant is unrepresented by counsel?

3. *Bail revocation hearings.* Where the trial court has appointed the Committee for Public Counsel Services to represent an indigent defendant in a criminal case, and the committee fails to provide representation for said defendant, is it error for the court conduct a hearing on a motion by the Commonwealth to revoke bail pursuant to G.L. c. 276, § 58, at which the defendant is unrepresented by counsel?
4. *Conditions of release.* Where the trial court has appointed the Committee for Public Counsel Services to represent an indigent defendant in a criminal case, and the committee fails to provide representation for said defendant, is it error for the court hear and decide a motion by the Commonwealth for conditions of release pursuant to G.L. 276, § 42A?
5. *Probation detention hearings.* Where the trial court has appointed the Committee for Public Counsel Services to represent an indigent defendant who is a probationer in a criminal case, and the committee fails to provide representation for said defendant, is it error for the court conduct a hearing on a request by the Probation Department to detain the defendant/probationer pursuant to District Court Rules for Probation Violation Proceedings Rule 6 at which the defendant is unrepresented by counsel?

It has recently been the experience of trial court judges in Chicopee District Court, Springfield District Court and other District Courts in Hampden County that, after defendants are found indigent and the Committee for Public Counsel Services has been appointed, the Committee for Public Counsel Services fails to provide attorneys for those defendants. On occasions, the Committee for Public Counsel Services, comprising both the private counsel division and the public counsel division, does not give advance notice to the court that there will be no duty lawyers

available on a given day. This failure has repeatedly occurred on Mondays, a particularly busy day for Springfield District Court, the busiest District Court in the Commonwealth.

These unrepresented defendants' right to counsel, and their right to remain silent (if they elect to speak in their own defense during such a hearing), come into direct conflict with valid issues of attendance at future court proceedings (questions of bail raised either by the Commonwealth, or by the court itself pursuant to G. L. c. 276, § 58); questions of public safety raised by the Commonwealth in motions for pretrial detention (dangerousness hearings) or bail revocation; and similar questions raised by the Probation Department's detention requests.

The lack of available attorneys is an increasingly frequent problem, leaving trial court judges unable to satisfactorily resolve the conflicting issues of the unrepresented defendants' constitutional rights and public safety issues raised by the prosecution and the probation department. Some judges have responded to this lack of available appointed counsel by detaining in the defendants without bail overnight or until the next session of the court, when the Committee for Public Counsel Services provides an attorney, either a Bar Advocate or a staff attorney from the public defender division, to represent these defendants.

The nature of the proceeding, whether it is a bail hearing, detention hearing, or dangerousness hearing, requires an immediate resolution, however constitutionally inadequate, to be made by 4:00 p.m. the same day. The court must then make a difficult choice between a possible violation of the defendant's right to counsel and the defendant's right to remain silent if he or she speaks in his or her own defense without counsel, and on the other hand the abrogation (by releasing the defendant) of the commonwealth's prerogative to seek bail or detention, and the probation department's responsibility to request detention of probationers, along with the concomitant public safety issues.

In the instant cases, Mr. Langley, who is charged with serious felony charges, has been held on bail, with no attorney, since May 10, 2004. Mr. Langley had an attorney for the bail hearing, but has languished in jail unrepresented by counsel since then. Mr. Bass has been at liberty, also charged with a serious felony, also without counsel.

The Committee for Public Counsel Services notified this court today that no attorneys were available to represent these defendants.

Wherefore, I respectfully submit that the issues of law raised herein are so important, likely to recur, and elusive of remedy absent a ruling by the Honorable Justices of the Appeals Court, that they require a determination by that court. I therefore respectfully request the guidance of the Honorable Justices of the Appeals Court by answer to the questions above.

Respectfully submitted,

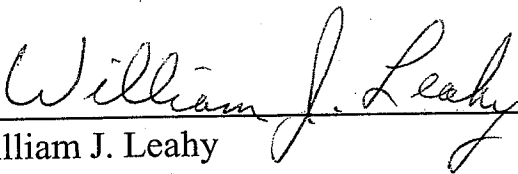
By: 

R. S. Koenigs, Justice
District Court Department

Dated: May 20, 2004

CERTIFICATE OF SERVICE

I, William J. Leahy, do hereby certify that on this 21th day of May, 2004, I served copies of the foregoing Petitioners' Further Status Report and Motion to Amend Petition to Name Additional Petitioners and Respondents and Affidavit in support thereof, by e-mail and first-class mail, to the offices of David Kerrigan, Assistant Attorney General, One Ashburton Place, Boston, Massachusetts 02108.



William J. Leahy
Chief Counsel
BBO #290140
COMMITTEE FOR PUBLIC COUNSEL SERVICES
44 Bromfield Street, Suite 200
Boston, Massachusetts 02108
(617) 482-6212